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NO. 90-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

GENE SCROGGY, WARDEN — Petitioner

versus

PAUL KORDENBROCK — Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

WHETHER THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ERRED IN FAILING TO FIND HARMLESS ERROR IN THE ADMISSION OF RESPONDENT'S CONFESSION, OBTAINED IN A NON-CONSTITUTIONAL VIOLATION OF MIRANDA V. ARIZONA, WHERE OVERWHELMING EVIDENCE OF RESPONDENT'S GUILT EXISTED AND HIS PERSONAL CONFESSION AT TRIAL WAS PART OF AN OVERALL TRIAL STRATEGY.

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Gene Scrcggy, Warden, petitions for a writ of certiorari to review the opinion of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The en banc opinion of the United States Court of Appeals for the Sixth Circuit is reported as Kordenbrock v. Scroggy, 919 F.2d

1091 (6th Cir. 1990). (Appendix A-1). The three judge panel opinion of the United States Court of Appeals for the Sixth Circuit is reported as Kordenbrock v. Scroggy, 889 F.2d 69 (6th Cir. 1989). (Appendix A-95). The opinion of the United States District Court for the Eastern District of Kentucky is reported as 680 F.Supp. 867 (E.D. Ky. 1988). (Due to extreme length, ten complete copies have been lodged with this Court; pertinent portions appear in Appendix A-130). The opinion of the Kentucky Supreme Court is reported as Kordenbrock v. Commonwealth, 700 S.W.2d 384 (Ky. 1985), cert. denied, 476 U.S. 1153 (1986).

JURISDICTION

The en banc order of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was rendered November 21, 1990 (Appendix A-1). Jurisdiction of this Court to review the opinion of the United States Court of Appeals for the Sixth Circuit is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The pertinent part of the Fifth Amendment to the United States Constitution provides:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . .

The pertinent part of the Fourteenth Amendment to the United States Constitution provides:

> [N]o state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; . . .

STATEMENT OF THE CASE

On Thursday, January 3, 1980, respondent and Michael Kruse were in the Florence, Kentucky Western Auto Store from 1:00 p.m. to 1:30 p.m. Store owner William Thompson was alone in the store as his sole employee, Stanley Allen, was at lunch. Respondent and

Kruse looked at the wood-cutting tools in the rear of the store. They indicated they were moving and needed to cut firewood. Mr. Thompson was suspicious of the pair as they acted like potential shoplifters.

The next day, respondent and Kruse again visited the store between 1:00 p.m. and 1:30 p.m. The pair looked at guns in a locked glass display case. Respondent asked Mr. Thompson to show him a Colt Python pistol from the case. Mr. Thompson's suspicions were again raised as both men continued to act like shoplifters and made motions as well as talked about something in the rear of the store.

Between 9:00 and 10:00 Friday evening, respondent and Kruse attended a party at the Cincinnati apartment of respondent's sister. Respondent arrived in a woozie and red-eyed state and was seen drinking beer and smoking marijuana. He also took cocaine and drank whiskey. Kruse supposedly ingested ten

quaaludes, drank beer and smoked marijuana. Both respondent and Kruse spent the night at the apartment.

Saturday morning, Kruse ingested three to four Quaaludes and drank three to four beers. Respondent drank two beers and ingested two Quaaludes. They left the apartment and bought ten Quaaludes from Jeffrey Piper at the gas station where Kruse was employed. They proceeded to the Western Auto Store.

Kruse later told his father that he and respondent decided to take the guns from Western Auto, but, not to hurt anyone. The "plan" was to sell the guns to get money to buy more drugs.

Kruse parked on the flat lot across the street from the Western Auto. Respondent reached under the seat of the car and grabbed a gun. Both men entered the store at the same time. Mr. Thompson looked up and saw respondent pointing a gun at him. Respondent ordered Mr. Thompson to the rear of the store and told him

to lie face down. Mr. Thompson told Mr. Allen to lie down also. Both men lay face down, head to head in a nine o'clock position. Respondent stood over both with the gun.

Mr. Thompson heard respondent yell "get the customer". A man and his son had entered the store. Kruse came up to the man from the back of the store or storeroom. Kruse answered negatively to his question of whether the store repaired chain saws. The man and child then left.

Mr. Thompson heard no conversation between respondent and Kruse. He did, however, hear glass break and figured it was the glass gun case. Mr. Thompson then heard a shot and felt a searing and burning sensation in the back of his head. He next heard a second shot which he knew was for Mr. Allen. Respondent, a former marksman in the Marine Corps, fired from a distance of seven to eight feet at both men's heads "so they wouldn't get up". He then

carried a cardboard box to the front of the store in which to place the guns. Respondent carried the box out of the store and across the street to Kruse's car. Kruse drove and respondent ducked down in the seat.

Although he was still alive and bleeding, Mr. Thompson was afraid to move for fear of being shot again. When he finally noticed respondent was gone, Mr. Thompson got up. He knew Mr. Allen was dead. He called the police, the ambulance, his wife and Mr. Allen's wife. Neither Mr. Thompson nor Mr. Allen offered any resistance at any time.

Respondent and Kruse drove to several friends' houses to sell the stolen guns. Two of the friends recognized respondent's picture when it appeared on the local news in a story about the robbery and murder. The two cooperated with police and respondent and Kruse were arrested.

During questioning by police, respondent orally confessed to the murder,

attempted murder and robbery. Respondent admitted guilt and then attempted to stop the questioning. The interrogation continued and respondent gave additional details and said he shot the two victims so "they wouldn't get up." He also signed a written statement admitting his crimes. (Appendix A-163). Before trial, respondent filed a motion to suppress his confession claiming police had failed to cease questioning when he attempted to exercise his right to remain silent. The trial court denied respondent's motion after an evidentiary hearing.

During its opening statement at trial, the Commonwealth told the jury respondent had confessed. (As part of his case-in-chief, the prosecutor introduced respondent's written statement. Appendix A-162). Immediately after the Commonwealth's opening statement, respondent personally gave an opening statement in which he admitted his participation in the robbery and his shooting of Mr. Thompson and Mr. Allen.

(Appendix A-166). Respondent told the jury he was "all messed up" from liquor and quaaludes and "never intended to shoot anybody." During closing argument, respondent's counsel reiterated the confession. In the penalty phase, defense counsel and witnesses offered respondent's confession and remorse as a mitigating factor.

The jury found respondent guilty of murder and attempted murder. Respondent plead guilty to committing the robbery in the midst of trial. He was sentenced to death on the murder offense, twenty (20) years on the attempted murder offense and twenty (20) years on the first degree robbery offense.

The Kentucky Supreme Court affirmed respondent's convictions. Kordenbrock v. Commonwealth, Ky., 700 S.W.2d 384 (1985). Respondent subsequently filed a petition for writ of habeas corpus in United States District Court. The United States District Court for

the Eastern District of Kentucky found respondent's confession during police questioning was not a product of coercion. The district court did, however, find respondent's confession was obtained in violation of his Miranda rights as the police failed to cease questioning upon respondent's request. 680 F.Supp. at 877. Relying on Oregon v. Elstad, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985) and Martin v. Wainwright, 770 F.2d 918 (11th Cir., 1985) (modified on other grounds in 781 F.2d 185 (11th Cir., 1986), cert. denied, 479 U.S. 909, 107 S.Ct. 307, 93 L.Ed.2d 281, the District Court determined, however, admission of respondent's statement at trial was harmless error, or in the alternative, any error was waived by respondent when he confessed during his opening statement. (Appendix A-130).

Respondent appealed to the United States Court of Appeals for the Sixth Circuit. In a unanimous opinion, the three-member panel

of the Court of Appeals affirmed the District Court's findings. Kordenbrock v. Scroggy, 889 F.2d 69 (6th Cir. 1989) (Appendix A-95). Respondent's suggestion for rehearing en banc was granted. Kordenbrock v. Scroggy, 896 F.2d 1457 (6th Cir. 1990). Narrowly, by a 7 - 6 vote, the Court of Appeals for the Sixth Circuit, sitting en banc, reversed the District Court. Kordenbrock v. Scroggy, 919 F.2d 1091 (6th Cir. 1990) (Appendix A-1). The majority declined to hold the admission of respondent's confession was harmless error. (Id.) This petition for a writ of certiorari to review the judgment of the en banc panel of the United States Court of Appeals for the Sixth Circuit now follows.

REASONS FOR GRANTING THE WRIT

This Court should grant review because the Sixth Circuit Court of Appeals has misapplied controlling case law from this Court. Additionally, in narrowly reversing this

case, the first capital case to be reviewed by the Sixth Circuit, the court below has created a conflict with the Eleventh Circuit and has even ignored one of its own prior decisions. Furthermore, two judges refused to apply harmless error analysis because this is a capital case. Quite simply, the Sixth Circuit has incorrectly decided an issue which is certain to recur. Review by this Court is essential to clarifying the boundaries of the Fifth Amendment when a technical Miranda violation occurs.

The Fifth Amendment guarantees "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." A violation of this guarantee occurs when a person is "compelled" by governmental coercion to bear witness against himself in the criminal process. See Colorado v. Connelly, 479 U.S. 157, 163-164, at n. 1, 107 S.Ct. 515, 93 L.Ed.2d 473 (1964).

Respondent argued he was "compelled" to confess at trial because the trial court overruled his suppression motion and the Commonwealth told the jury in opening statement respondent had confessed. The en banc majority of the Sixth Circuit held that respondent's decision to confess in his opening statement was a response to the trial court's pre-trial ruling and declined to recognize that respondent's actions were trial strategy and his only avenue of defense. The en banc majority specifically rejected this Court's decision in Oregon v. Elstad, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985).

In Elstad, the petitioner contended his confession was tainted by an earlier failure to provide Miranda warnings and should have been excluded as "fruit of the poisonous tree." This Court concluded it would be an unwarranted extension of Miranda to hold a simple failure to administer the warnings, unaccompanied by any

actual coercion or attempt to undermine the suspect's ability to exercise his free will, so taints the investigatory process that a subsequent voluntary and informed waiver is worthless. The test, this Court stated, is whether the subsequent confession was knowingly and voluntarily made. 470 U.S. at 309, 105 S.Ct. at 1293, 84 L.Ed.2d at 232.

In Martin v. Wainwright, supra, the Eleventh Circuit held the reasoning of Elstad applied to a situation precisely the same as respondent's. In Martin, police did not honor a suspect's request to discontinue questioning. The suspect confessed during questioning and confessed again several days later. In applying Elstad, the Eleventh Circuit held since the police had violated only "the technical requirements of Miranda" and "not the Fifth Amendment itself," the absence of coercion in the first confession rendered the fruit of the poisonous tree doctrine inapplicable. The

Eleventh Circuit thus held the Miranda violation in the first confession did not automatically require exclusion of the second confession. Martin, 770 F.2d at 928.

The Sixth Circuit's decision to ignore Elstad also disregards decisions by the First Circuit in Bryant v. Vose, 785 F.2d 364 (1st Cir. 1986) and the Eighth Circuit in United States v. Packer, 730 F.2d 1151 (8th Cir. 1984). See also Duckworth v. Eagan, 492 U.S. 195, 109 S.Ct. 2875, 106 L.Ed.2d 166, 180 (1989) (O'Connor, J., concurring) and Michigan v. Harvey, 494 U.S. ___, 110 S.Ct. 1176, 108 L.Ed.2d 293 (1990).

The question in the present case is whether respondent's personal confession to jurors during his opening statement was made knowingly and voluntarily. Respondent claims his decision to confess during opening statement was "tainted by the improper procurement of the

confession and the erroneous ruling of the trial judge."

The District Court's findings more accurately reflect the situation:

> As has been stated, petitioner delivered his own opening statement at the trial at which time he reiterated his confession to having been one of the robbers of the store and to being the one who shot the two clerks. In the opening statement he denied knowing why he had shot the two men. This was part of a strategy to lay the basis for an argument to be made later by his attorneys that he lacked the intent to commit murder because he was under the influence of drugs. It was also part of the defense strategy to appeal to the sympathy of the jury by having petitioner express his regret for his acts in the opening statement. This strategy was further pursued by his able counsel by having petitioner plead guilty to the robbery later in the proceedings, and by arguing during the penalty phase after conviction that petitioner had resolved to mend his ways and reform his life, as evidenced in part by his forthright confession.
>
> Obviously, the reiteration of the confession in the opening statement was completely voluntary

> and made only after petitioner was fully advised of his rights by his own trial counsel. Indeed, no claim is made to the contrary.

(Appendix A-141). Respondent knowingly and voluntarily confessed to the shootings during his opening statement. This cunning strategy allowed respondent to personally address jurors without subjecting himself to cross-examination.

The en banc opinion misinterprets the effect of respondent's confession by refusing to hold its admission harmless. In the face of overwhelming evidence of respondent's guilt and the obvious necessity of appellant's actions as his only possible defense, the en banc majority focused on one minute sentence in respondent's confession to the exclusion of all else. While the majority acknowledged that "circumstantial evidence surrounding the shootings supports a finding of intent to kill," it still found it impossible to state that respondent's admission he shot them so "they wouldn't get up" did not

affect the outcome of the guilt and sentencing phases. Judge Kennedy's dissent more accurately sets forth the true extent of the overwhelming evidence of respondent's guilt and respondent's defense thereto:

> It is beyond a reasonable doubt that the verdict of guilty of capital murder against appellant would have been the same regardless of the admission of the confession. The evidence establishing appellant's guilt in the murder and shooting was overwhelming. The surviving victim of the shooting positively identified appellant and testified how the murder and attempted murder occurred. Appellant, in the course of robbing the store, ordered the two store employees to the back room, forced them to lie prone, and then shot them execution-style. Even if the confession had not been admitted, the only defense available to appellant would be to admit the killing and shooting, but to deny intent because of drug and alcohol use.
>
> The identity of appellant was conclusively established. William Thompson, the surviving victim, had ample opportunity to observe appellant. Two days before the robbery appellant and Michael

Kruse were at the Western Auto store from 1:00 to 1:30 p.m. examining woodcutting tools. Thompson was alone at the store and Stanley Allen was at lunch. The next day, appellant and Kruse again went to the store at 1:00 p.m., and appellant purchased a hatchet. Appellant also saw several guns in a glass display case and asked to look at a Colt Python pistol. Thompson showed him the gun and appellant and Kruse left the store without incident.

Further, less than an hour after the robbery, appellant and Kruse went to a Gary Ramell's home where they sold him three of the stolen guns for $200. They then went to the home of Richard Fehler where at 10:30 a.m. they sold two guns, payment for which was due January 15, 1980. According to Fehler, appellant appeared jittery and took some Quaaludes. That afternoon, appellant met a Larry Hensley who purchased six guns for $300, payable the next day. In the meantime, Ramell saw a newscast about the robbery and murder which included composite drawings resembling appellant and Kruse. Hensley also saw the news and noticed that the guns he bought from appellant came in a Western Auto box containing broken glass. Ramell, Fehler, and Hensley decided to cooperate with the police. Hensley arranged to

meet appellant at 10:00 p.m., the day following the robbery, to pay for the guns he received from appellant. Appellant was arrested at 10:10 p.m. that night.

Any claim of accidental shooting was impossible in view of the manner in which both store employees were shot. The only possible explanations for shooting the men, one in the back of the head and the other in the back of the neck, were that they were attempting to get up or that appellant was attempting to execute them so they could not identify the robbers. In the absence of diminished capacity, intent to kill was the only possible inference a reasonable juror could infer from the circumstances of the crime. The confession that he shot them so "they wouldn't get up" could not affect the outcome.

Had the illegal portion of appellant's confession been suppressed, appellant would have been required to adopt the same trial strategy out of necessity because he was not in a position to claim he did not commit the murders. (Footnote omitted). Before Kordenbrock asked to stop the interrogation, he had admitted committing the murder. This admission was made after he waived his Miranda rights. The basic admission of guilt was thus not

obtained in violation of Miranda. He would have admitted the shooting and he would have claimed diminished capacity through drug and alcohol use. Given the strength of the circumstantial evidence establishing intent, his statement that he shot the men so "they wouldn't get up" gave relatively little additional basis for establishing intent. The most persuasive, damning indication of his intent lay not in the statement that he shot them so "they wouldn't get up," but rather in the facts and circumstances surrounding the crime. The statement in the confession is equivocal on the question of whether it proves intent--it could be an explanation for why he shot the men, or it could be an additional fact gratuitously added at the time of his confession. With or without admission of the confession, appellant would have to at least admit the fact that he shot the two men. The fact that he said in his written confession that he shot them so they wouldn't get up is no more indicative of intent to kill than would be the phrase "I shot them so we could escape" or "I shot them so they would not identify us." Once the circumstances of the shooting were established, there was no explanation except diminished capacity under which the jury would not infer intent to kill.

(Appendix A-38). Based upon this recitation of proof, respondent's statement that he shot the two victims so "they wouldn't get up" did not affect the jury's guilty verdict or death sentence. Thus, use of the confession was harmless.

The en banc majority opinion also ignores its own precedent. In Burks v. Perini, unpublished opinion, 810 F.2d 199 (6th Cir. 1986), cert. denied, 481 U.S. 1052, 107 S.Ct. 2188, 95 L.Ed.2d 843 (1987), the Sixth Circuit held admission of an invalidly obtained confession was harmless and rejected the defendant's claim that he confessed to the jury as part of his defense strategy only because the trial court erroneously admitted his illegal confession. (Appendix A-155). Under circumstances impossible to distinguish from the case at bar, Burks shot two men, one of whom died and the other of whom survived. The surviving victim testified Burks had shot both

men without provocation. The Sixth Circuit concluded, in light of the substantial independent evidence that Burks had indeed shot both of the victims and that the shootings were unprovoked, a self defense theory was the only recourse available to Burks to justify the shootings. Accordingly, the Sixth Circuit concluded the state's use of Burks' invalidly obtained statement did not induce him to testify and the trial court's decision to admit his confession constituted harmless error. The en banc majority erred by not following the same reasoning in the instant case.

The en banc majority relies on Owen v. Alabama, 849 F.2d 536, 540-41 (11th Cir. 1988). The case at bar is readily distinguishable from Owen. First, Owen confessed only once. During his confession his request for an attorney was ignored. Unlike respondent, Owen did not give a second voluntary confession. Second, the cold blooded tenor of Owen's confession far surpassed

respondent's explanation for the shootings. Owen was charged with an intentional killing. Like respondent, he used affirmative defenses (insanity, self-defense) to rebut the question of intent. The Eleventh Circuit held that admission of Owen's confession was not harmless and indeed negated his defense since Owen stated in his confession "[I]f I had a thousand [shells] in there, I would have shot a thousand. Maybe this will teach them a lesson." 849 F.2d at 540. Owen's statement clearly evinced intent to kill. Respondent's statement, on the other hand, "I shot them so they wouldn't get up," does not rise to this level of obvious deliberation and cold blooded malice. Even the Eleventh Circuit, which decided both Martin, supra and Owen, recognized the vast differences in the two scenarios and the inapplicability of Martin. Respondent's case is identical to Martin. The Sixth Circuit thus incorrectly uses Owen as precedent to

reverse a capital case where there has been a second, voluntary confession.

The en banc opinion also erred by holding respondent's confession was not harmless as to the sentencing portion of the trial. According to the majority, the confession was "extremely prejudicial" in the sentencing phase because it omitted reference to drug use and because its tenor was "cold." The majority opinion has again ignored an abundance of evidence in order to seize upon five words. Nothing in the written confession undermined respondent's defense of diminished capacity. Respondent introduced independent and substantive evidence at trial in support of his diminished capacity theory. Again, Judge Kennedy's dissent sets forth the true nature of the evidence:

> The jury was presented with the testimony of several witnesses who observed appellant either immediately before or after the shootings. Terry Hall testified

that appellant arrived at a party at his sister's residence the night before the shootings "in bad condition" with red eyes, slurred speech, and appearing "kind of woozie." Trial Exhibits (TE) 4158, 4164, 4170. Gary Ramell stated that he was "spaced out" and "pretty messed up" at the party. The morning of the murders, approximately seven hours after the party, he awoke and drank two beers and took two Quaaludes, and then took another Quaalude thirty minutes later. Dr. Eljorn Don Nelson, TE 4294-95. Jeffrey Piper testified that he sold appellant ten more Quaaludes about thirty minutes before the shootings. TE 4113. He told the jury that appellant "was very high on Quaaludes," that his speech was slurred, and that his eyes were messed up. TE 4116, 4136. Gary Ramell again testified that about thirty minutes after the shootings he saw appellant and that he appeared "kind of mellow, he didn't seem like he had a care in the world," TE 3791, and that he was glassy-eyed. TE 3806. In his opening statement to the jury, appellant stated that he "shotgunned" two beers the morning of the shootings and took a Quaalude. After stopping to get gas and buy more drugs, he took two more. Appellant also told the jury that when he shot the two men, he was "standing there all messed up from the night before

and what I had already consumed that morning." He told the jury that he "never intended to shoot anybody . . . [i]t just happened." The jury was thus fully aware of the degree of appellant's drug and alcohol consumption at the time of the shootings.

* * *

Admission of the confession did not prevent him from putting before the jury all available evidence of his intoxication due to drugs and alcohol. The evidence supporting diminished capacity was neither contrary to, nor even inconsistent with, the statements made in his written confession. Appellant was as able to put on evidence explaining his mental state when he shot the two men as he would have been had the confession been suppressed. It seems to me logically impossible for the confession to have prejudiced his ability to make his diminished capacity defense.

This is not a situation where appellant sought to suppress a confession containing statements contrary to what he would attempt to prove at trial. For example, if appellant had <u>denied</u> using drugs or alcohol in his confession, the erroneous admission of it would undermine his defense of diminished capacity and

constitute prejudicial error in the manner urged by the majority.

* * *

> Appellant tempered any harshness of his written confession by his direct appeal to the jury in his opening statement and all the substantive evidence at trial showing his drug and alcohol use. Thus his written word was supplemented with an explanation of his mental state when he shot the two men. That the jury did not believe his defense cannot be logically attributed to his confession, a confession that made no reference to drug and alcohol use. Nothing he added at trial to soften the confession's tenor was even slightly inconsistent with or contrary to his written statement. Although I agree that the written confession may have appeared "cold" to the jury, I cannot agree with the majority that it was prejudicial. No juror, given all the evidence of intoxication, could have rejected the evidence out of hand because of the confession's tenor.

(Appendix A-43).

As stated, the en banc majority reversed the judgment of the District Court by a 7 - 6 vote. In his concurring opinion, Judge

Nelson stated "if this had not been a capital case, I would have been quite willing to invoke the harmless error rule." (Appendix A-88). Judge Nelson's refusal to consider the harmless error rule in a capital case, joined by Judge Ryan, is a deviation from this Court's precedent. Most recently in Satterwaite v. Texas, 486 U.S. 249, 108 S.Ct. 1792, 100 L.Ed.2d 284 (1988) this Court applied harmless error analysis in a capital case. See also: Milton v. Wainwright, 407 U.S. 371, 92 S.Ct. 2174, 33 L.Ed. 1 (1972) and Gilbert v. California, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967). As stated by the New Jersey Supreme Court in State v. Davis, 561 A.2d 1082 (N.J. 1989), "To judge capital defendants differently would effectively diminish the rights of noncapital defendants, a disquieting result that we reject. There either is a constitutional violation or there is not. There can be no double standards." 561 A.2d at 1089.

Review is essential to correct the Sixth Circuit's refusal to apply Oregon v. Elstad and resolve the conflict between the Eleventh and Sixth Circuit Courts of Appeal. Use of respondent's confession was harmless error.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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